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In the

Supreme Court of the United States

October Term, 1983

MOBIL OIL CORPORATION, EXXON CORPORATION, GULF OIL CORPORATION and MARATHON PETROLEUM COMPANY,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and DONALD P. HODEL, SECRETARY OF ENERGY

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

(Attorneys' Names appear on inside cover)

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QUESTIONS PRESENTED

This case involves a rule which required petroleum refiners to pretend that certain costs incurred in refining had been recovered in their prices even though, in fact, they had not. Based on those fictitious recoveries, the rule exposed refiners to potential liabilities for overcharges that may reach several billion dollars. Notwithstanding its significance, the rule was adopted without advance notice or an opportunity for public comment.

Three district courts held that the agency's failure to follow statutory rulemaking procedures was inexcusable and invalidated the rule. The Temporary Emergency Court of Appeals ("TECA") disagreed, holding that the agency's speculation regarding the potential consequences of giving notice of the rule supplied sufficient good cause to dispense with such notice. TECA also held that, in any event, the rule had been validly repromulgated in a later proceeding which proposed modifications to the rule. The questions presented are:

1) Whether the Administrative Procedure Act and the more stringent Federal Energy Administration Act permit an agency to dispense with public rulemaking procedures based solely on its "predictive judgment" that notice of a proposed rule might lead to conduct contrary to the rule during the comment period?

2) Whether an agency's "predictive judgment" on the possible effects of prior notice is entitled to "special deference" which effectively insulates that judgment from judicial review?

3) Whether an agency can find "good cause" to dispense with public rulemaking procedures when the public's right to participate can be readily accommodated with all valid concerns of the agency?

4) Whether an agency can validly promulgate a rule by permitting interested parties to urge its repeal in a later proceeding?

5) Whether the statement of basis and purpose required by the Administrative Procedure Act may be "non-existent" and need not mention the rule, any supporting grounds or any comments received?

PARTIES TO THE PROCEEDING

The caption of this Petition contains the names of all parties in this case in the court of appeals.[1] The court of appeals consolidated oral argument of this case with *Naph-Sol Refining Co. v. Murphy Oil Corp.*, 550 F. Supp. 297 (W.D. Mich. 1982), and issued a single opinion in both cases. The accompanying note lists persons who filed briefs *amici curiae* in the court of appeals.[2]

1. Pursuant to this Court's Rule 28.1, a listing of each petitioner's non-wholly-owned subsidiaries or affiliates is set forth in the Appendix to this Petition ("Pet. App.") at A-119-140.

2. Krank J. Kelley, Attorney General, State of Michigan; Charles E. Graddick, Attorney General, State of Alabama; Tyrone C. Fahner, Attorney General, State of Illinois; LeRoy S. Zimmerman, Attorney General, Commonwealth of Pennsylvania; Kenneth Cory, Controller, State of California; Go-Tane Service Stations, Inc.; Kickapoo Oil Company, Inc.; Lake Shore Oil Company; Growmark, Inc.; Richard W. Dyke, dba Western Stations Co.; Colvin Oil Company and F.O. Fletcher, Inc., dba Fletcher Oil Company.

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MOBIL OIL CORPORATION, EXXON CORPORATION, GULF OIL CORPORATION AND MARATHON PETROLEUM COMPANY,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY AND DONALD P. HODEL, SECRETARY OF ENERGY,

Respondents.

Petitioners Mobil Oil Corporation, Exxon Corporation, Gulf Oil Corporation and Marathon Petroleum Company (hereinafter collectively referred to as "petitioners") respectfully pray that a writ of certiorari issue to review the judgment of the Temporary Emergency Court of Appeals ("TECA") entered in this action on December 20, 1983.

OPINIONS BELOW

TECA's opinion, Nos. 2-40, 6-31, is not yet reported but is reproduced at Pet. App. A-1-45. The opinion of the United States District Court for the Northern District of New York (Munson, Ch. J.) is reported at 547 F. Supp. 1246 (N.D.N.Y. 1982) and is reproduced at Pet. App. A-46-91. The decision of the United States District Court for the Western District of Michigan in the companion case of *Naph-Sol Refining Co.* v. *Murphy Oil Corp.* is reported at 550 F. Supp. 297, 315 (W.D. Mich. 1982) and is reproduced at Pet. App. A-92-113.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1983 (Pet. App. A-ll4) and a timely petition for rehearing was denied on February 10, 1984 (Pet. App. A-ll5). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 *note*, as incorporated in § 5(a)(1) of the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 754(a)(1).

STATUTES INVOLVED

Pertinent portions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, and the Federal Energy Administration Act ("FEAA"), 15 U.S.C. § 766(i)(1), are set forth in the Appendix at Pet. App. A-ll6-ll7.

STATEMENT OF THE CASE

Petitioners brought this action seeking declaratory and injunctive relief[3] respecting certain provisions of the Mandatory Petroleum Price Regulations, former 10 C.F.R. Part 212, which governed the prices refiners could charge for motor gasoline from 1973 until 1981.[4] The complaint challenged the validity of two price control rules. The first, known as the "three cent" retail price equalization rule, is not the subject of this petition. The second, known as the "equal application/deemed recovery" rule or "deemed recovery" rule, is explained below.

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3. The district court's jurisdiction was invoked under Section 5(a)(1) of the EPAA, 15 U.S.C. § 754(a)(1); Section 211 of the ESA, 12 U.S.C. § 1904, note; section 523(b) of the Energy Policy and Conservation Act, 42 U.S.C. § 6393(b); Section 502(b) of the Department of Energy Organization Act, 42 U.S.C. § 7192(b); the Administrative Procedure Act, 5 U.S.C. § 702; and under 28 U.S.C. §§ 1331, 1337, 1361, 2201 and 2202.

4. These regulations were rescinded by President Reagan on January 30, 1981, Executive Order No. 12287, 46 Fed. Reg. 9909 (Jan. 30, 1981).

Regulatory Background

The basic feature of the price regulations was a maximum price which refiners could not lawfully exceed. With exceptions not relevant here, the maximum price was the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus certain increased costs incurred since then. 10 C.F.R. § 212.82(f)(1)(i).[5] If refiners did not charge the maximum price, they could hold available or "bank" unrecovered increased costs for use in future months. 10 C.F.R. § 212.83(e)(1).

The Equal Application/Deemed Recovery Rule

On September 5, 1974, the Federal Energy Administration ("FEA") amended the "bank" rule without providing notice or an opportunity for public commentary. 39 Fed. Reg. 32307 (September 5, 1974). The amendment (the "equal application/deemed recovery" rule) was intended to discourage, but not prevent, refiners from passing through unequal amounts of costs to their different classes of purchaser of a product. Under the rule, the one at issue here, a refiner was required to compute its cost recoveries as though the largest increment of costs recovered in any individual sale had been recovered in all sales of the product involved.[6] 10 C.F.R. § 212.83(d), 39 Fed. Reg. 32309 (1974). Thus, if a refiner unequally applied its costs among classes, it was "deemed" to have recovered the difference. An exception provided that refiners were not subject to this deemed recovery penalty where the unequal application of costs resulted from the price term of a written contract entered into on or before September 1, 1974.[7]

The rule was designed to encourage the maintenance of historic price differentials among classes by discouraging refiners from offering lower prices to selected customers in response to market

5. Citations are to the regulations as repromulgated at 39 Fed. Reg. 1951, *et seq.* (1974).
6. The full text of the rule is set forth at Pet. App. A-117-118.
7. *Id.*

conditions. As applied by the agency, however, the rule can have a staggering effect when refiners charged prices lower than the lawful maximum.

Assume, for example, that a refiner either inadvertently misclassified a customer or incorrectly computed the May 15, 1973 price for his class, resulting in a per gallon price 5¢ higher than the correctly determined price, but still less than the maximum. Under the equal application rule as applied by the agency, the refiner would be required to pretend that the 5¢ had been recovered on every gallon sold, even if the particular customer bought only ten gallons per month. Thus, if the refiner sold 10 million gallons of product per month, its regulatory penalty for this single error would be some $37 million for the 74-month lifetime of the rule. If it sold 100 million gallons a month, the penalty for its 5¢ regulatory transgression would be $370 million.

This potential impact is not hypothetical. The agency represented to the court of appeals that its current enforcement proceedings allege in excess of one billion dollars in overcharges based on these fictitious cost recoveries.[8] Private suits involve untold millions more.

Notwithstanding the rule's significant effects, the agency waived notice and comment procedures, asserting that an "emergency" existed. 39 Fed. Reg. at 32307. Acknowledging that "sellers were not specifically required actually to charge the prices arrived at under the regulations," *id.*, the agency concluded that the regulations should be changed to reflect that "prices actually charged, and not merely prices calculated as lawful maximums must reflect the equal application of increased costs." *Id.* The claimed emergency was that "announcement of [the] amendments would highlight current ambiguities in the Regulations and could result in sellers seeking to take advantage of the ambiguity or of the contract exception to the Rule." *Id.*

8. *See* Brief of Defendants-Appellants at 22, dated December 21, 1982.

The September 10, 1974 Rulemaking

Five days after adopting the rule, the agency proposed a number of significant changes in the regulations, including "modifications in the equal application of increased product costs requirements."39 Fed. Reg. 32717 (Sept. 10, 1974). The agency noted that the newly promulgated rule was "responsible for an inflexibility in the price regulations which becomes more troublesome and causes more dislocations in the market as supplies of petroleum products increase" and that, in certain instances, the rule "runs counter to the interests of independent regional marketers."*Id.*

The agency also concluded that the rule resulted "in selling prices that are too high to be competitive in some markets and are too low in other markets" and that the rule "creates an inflexibility that can have results that appear to be at odds with the objectives of the EPAA."*Id.* It therefore decided that "the equal application requirement should be modified" but added:

> To the extent that the current requirement serves to protect the independent sector of the market, FEA has concluded that it must be retained.

Id.

The December 5, 1974 Rulemaking

On December 5, 1974, the agency adopted several of the changes it had proposed on September 10, 1974 and, in publishing the regulations as amended, republished the deemed recovery rule. 39 Fed. Reg. 42368 (Dec. 5, 1974). The regulatory preamble made no mention of the rule or any comments received in response to the agency's September 10 proposal to amend the rule. The preamble simply stated that "those possible revisions which have not been acted on continue to be under active consideration."*Id.*

Although the agency republished the rule on December 5, it stated nineteen days later that it had "not yet completed its analysis of [the September 10] proposal" to modify the rule. 39 Fed. Reg. 44407 (Dec. 24, 1974).

The Decision of the District Court

On cross-motions for summary judgment, the district court found the equal application rule procedurally invalid. 547 F. Supp. 1246, Pet. App. A-46-91. The court noted that, although the APA's "good cause" exception is to be "narrowly construed," its use could be "justified by obvious and compelling facts."Pet. App. A-87. The court also noted that the FEAA's more stringent exception was to be invoked "very sparingly."*Id.* Concluding that waiver would be proper only if an "exigency" was presented, not just a claim "that an agency action [is] in furtherance of regulatory objectives. . . ,"*id.* at A- 88, the court held that "[h]ere, there [were] no compelling circumstances" warranting waiver of statutory rulemaking procedures. *Id.*

The district court also rejected the agency's alternative argument that the rule had been validly repromulgated when it was republished on December 5, 1974. As the court found, the September 10 notice "concerned only *modifications* of [the equal application] requirement, and specifically advised interested persons that the agency was not contemplating the elimination of the requirement." *Id.* at A-89 (emphasis in the original).

Nine days after the district court's decision, another court independently came to the same conclusion. *Naph-Sol Refining Co. v. Murphy Oil Corp.*, 550 F. Supp. 297 (W.D. Mich. 1982),[9] Pet. App. A-92-113. That court found that the agency lacked "good cause" for waiving rulemaking requirements and rejected the agency's repromulgation argument because the December 5 preamble did not contain the statement of basis and purpose required by 5 U.S.C. § 553(c). Pet. App. A-109-110.

The Decision of the Court of Appeals

On appeal, TECA reversed both *Naph-Sol* and the district court's decision. TECA concluded that the agency's disregard of

9. The deemed recovery rule had earlier been invalidated in Lakes Gas Co. v. DOE, 477 F. Supp. 187 (D. Minn. 1979). Thus, three district courts have held the rule to be procedurally invalid.

public rulemaking procedures was justified because "announcement of the deemed recovery rule could have generated selective pricing and 'grandfathering' of unequal prices in favor of refiner-operated stations."Pet. App. A-31-32. The court of appeals found that the agency's "predictive judgment" in this regard was entitled to "special deference," *id.* at A-31, and declined to "second-guess" the agency's guess. *Id.* at A-32.

TECA further held that, in any event, the rule was validly promulgated when it was republished on December 5. In the court's view, the September 10 proposal, which it cited as the agency's finding of good cause to adopt the rule without notice, was also a proposal to abolish the rule. Pet. App. A-35-36. The court found that the rule had been validly promulgated because refiners had been given an opportunity "to urge its repeal."*Id.* at A-37.

Finally, the December 5 notice, allegedly readopting the rule, was found to contain an adequate statement of basis and purpose even though it did not mention the rule, discuss comments received or specify reasons for the rule's adoption. *Id.* at A-38-39. The court stated that even a "non-existent" statement could satisfy the APA's statement of basis and purpose requirement. *Id.* at A-38. Although TECA found that the rule had been repromulgated on December 5, the agency stated nineteen days later that it had not yet completed its analysis of the September 10 proposal to modify the rule.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision departs from settled principles of administrative law, conflicts with decisions of other courts of appeals, and threatens to upset the balance struck by Congress in enacting the APA and FEAA. The decision presents questions of exceptional importance since, as this Court has emphasized, Congressionally established rulemaking requirements represent "a formula upon which opposing social and political forces have come to rest."*Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523 (1978). If left undisturbed, the decision will

stand as an open invitation for agencies to ignore rulemaking procedures designed to ensure open and informed governmental decisionmaking. TECA accepted, without question, the agency's "good cause" determination, declining to "second-guess" the agency's "predictive judgment" that notice and opportunity to comment could have had adverse consequences. Pet. App. A-31-32. Its blind deference to the agency's invocation of its predictive powers clashes directly with this Court's recent teaching in *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856 (1983), as well as the decision in *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983). Moreover, TECA's approach gives an agency license to bypass proper rulemaking procedures, secure in the knowledge that a court will not review its "prediction" that notice and comment could lead to conduct it disfavors. Judicial creation of such an all-purpose escape clause warrants this Court's plenary review.

The court of appeals also endorsed the propositions that (1) a rule may be properly promulgated without advance notice and opportunity for comment if the agency later permits regulated parties to "urge its repeal" and (2) a rule may be upheld even when the basis and purpose statement is "non-existent." Pet. App. A-37-38. The first proposition is at odds with decisions of other courts of appeals and warrants this Court's review to ensure uniformity among the circuits. The second is an unprecedented negation of an essential element of valid rulemaking.

Review by this Court is necessary to "ensure that agencies comply with the 'outline of minimum essential rights and procedures' set out in the APA." *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979). Where, as here, the agency's action has enormous financial consequences, review is especially appropriate since "with the consideration that is the necessary and intended consequence of such procedures, [the agency] might have decided that a different accommodation was more appropriate." *Id.* at 303, 316.

I.

THE DECISION BELOW PRESENTS IMPORTANT QUESTIONS REGARDING APPLICATION OF THE APA AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL

A. By According the Agency's "Good Cause" Determination Total Deference, TECA Excused the Agency from Applicable Rulemaking Procedures on Grounds That Were Legally Inadequate and the Product of Irrational Speculation

The agency bypassed notice and comment procedures in this case because it feared that (1) "highlighting the gap in the Regulations through advance notice would promote discriminatory pricing" and (2) "refiners would seek to take advantage of the 'contract exception' to the deemed recovery rule and 'grandfather in' unequal cost pass-throughs to refiner operated stations by entering into long-term contracts." Pet. App. A-28. In approving that action, TECA held that "good cause" justified the immediate adoption of the deemed recovery rule—not because of the need to deal with an existing emergency but because a notice of proposed rulemaking purportedly could have induced companies to engage in pricing activities that the agency sought to discourage through the rule.

TECA acknowledged the danger inherent in its approach. It noted "that agencies might frequently assert that someone will take advantage of the situation if advance notice is given" and that, so applied, the good cause exception could "become an all purpose escape-clause" to proper rulemaking procedures. Pet. App. A-29. Nevertheless, it refused to "second-guess" the agency's good cause determination because it involved "[j]udgments of a predictive nature" that were entitled to "special deference." Pet. App. A-30-31. TECA thus "treat[ed] the predictive nature of the judgment 'as though it were a talisman under which any agency decision is by definition unimpeachable.'" *International Ladies' Garment Workers' Union v. Donovan*, *supra*, 722 F.2d at 821, *quoting Motor Vehicle Manufacturers'*

Ass'n v. State Farm Mutual Automobile Insurance Co., supra, 103 S. Ct. at 2870. Under TECA's decision, an agency may hide behind its "predictive judgment," exempt from effective judicial review.

TECA's total deference to the agency's unsupported "predictive judgment" conflicts with this Court's recent decision in *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Automobile Insurance Co., supra.* In *State Farm* this Court recognized that "it is not infrequent that the available data do not settle a regulatory issue" but found that such circumstances do not permit an agency merely to recite its conclusions. 103 S. Ct. at 2871. Instead, the "agency must explain the evidence which is available and must offer a 'rational connection between the facts found and the choice made.'" *Id. See also id.* at 2869. Here, the agency offered no more than its own *ipse dixit* that refiners might take advantage of prior notice. In the absence of any support or evidence, TECA should have followed this Court's holding and ruled that the agency failed to offer any rational support for its conclusion.

TECA's "special deference" to the agency's prediction also squarely conflicts with the recent decision in *International Ladies' Garment Workers' Union v. Donovan, supra.* Based on this Court's decision in *State Farm*, the District of Columbia Circuit there rejected the argument that courts are obliged to defer blindly to an agency's alleged superior ability to make predictions. 722 F.2d at 821-22. The *Donovan* court recognized that unrestrained deference would "effectively nullif[y]" judicial review and transform agency expertise into a "monster which rules with no practical limits on its discretion." *Id.* at 822 (citations omitted). TECA's departure from this Court's decision in *State Farm* and the resulting conflict with the decision in *Donovan* merit review by this Court.

1. *TECA Improperly Expanded the Good Cause Exception*

The decision below permits an agency (1) to determine, without public input, that a rule is in the public interest, (2) to determine that noncompliance with the new rule during a short comment period would itself create an emergency justifying failure to give notice, and (3) to insulate its actions from judicial review by failing to create an administrative record and by relying on its own "predictive judgment" as to the future. The APA and more stringent FEAA,[10] however, reflect Congress' judgment that notice is in the public interest. Congress directed the agency to consider public commentary *before* concluding that the public interest supports promulgation of a rule. By accepting the agency's determination that a rule is desirable and that noncompliance during a notice period should not be permitted, TECA so expanded the good cause exception that it may be applicable in virtually every rulemaking situation.

This Court has never had occasion to examine the standards governing an agency's waiver of public rulemaking under the APA's good cause exception, 5 U.S.C. § 553(b)(B). In most cases, the inquiry is uniquely factual, requiring a determination that an "emergency situation" exists. *E.g.*, *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 488 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983), *quoting American Federation of Government Employees v. Block*, 655 F.2d 1153, 1156

10. The courts should be particularly vigilant to guard against agency circumvention of rulemaking requirements where, as here, Congress chose to impose rulemaking "requirements [that were] 'more rigorous than those provided for in the APA.'" *Standard Oil Co. v. DOE*, 596 F.2d 1029, 1058 (TECA 1978), *quoting Phillips Petroleum Co. v. DOE*, 449 F. Supp. 760, 799-800 (D. Del. 1978). The Federal Energy Administration Act "provide[d] only the narrowest exemption from its publication, notice, and comment requirements." *Standard Oil Co. v. FEA*, 453 F. Supp. 203, 243-44 (N.D. Ohio 1978), *aff'd sub nom. Standard Oil Co. v. DOE*, *supra*. It authorizes waiver of notice and comment only where strict compliance with proper procedures would have caused serious harm or injury to the public health, safety or welfare. 15 U.S.C. §766(i)(1)(B). Congress intended that this waiver provision "be used very sparingly." S. Rep. No. 788, 93d Cong., 2d Sess. 27, *reprinted in* [1974] U.S. Code Cong. & Ad. News 2972, 2977.

(D.C. Cir. 1981). In this case, however, TECA did not find that an emergency existed. Its decision deals instead with a generic situation common to all administrative agency practice.

Whenever an agency gives notice of a proposed rule, it can safely predict that regulated parties might seek to avoid the rule during the rulemaking process. Such actions will always be contrary to the agency's tentative conclusions regarding the public interest. Congress believed, however, that this cost of rulemaking was outweighed by the salutary benefits of permitting the public to educate the agency through the rulemaking process. Petitioners therefore submit that in circumstances such as these, an agency may dispense with notice and comment only upon a showing that the rule itself is necessary to protect an important public interest *and* when there is a significant threat that regulated parties are likely to avoid the proposed rule during the comment period. Here, of course, the deemed recovery rule was not necessary to protect the public interest since the agency proposed its amendment five days after it was published.

This Court's review is warranted to prevent the decision below from creating the "all purpose escape-clause" which TECA itself feared. If agencies are indeed to be permitted such an exception, it should only be upon the determination and under standards endorsed by this Court.

2. *TECA's Refusal to Scrutinize The Record Merits Review*

TECA itself has emphasized the court's "duty to scrutinize the record to ascertain whether in fact an exception [to the APA] did exist,"[11] noting: "[it] is axiomatic that [the agency's] mere recital of good cause does not create good cause."[12] By simply deferring to the agency's speculation in this case, TECA abdicated its duty and failed to inquire whether there was any basis for the agency's speculation. Such an inquiry would have revealed

11. Mobil Oil Corp. v. DOE, 610 F.2d 796, 804 (TECA 1979), *cert. denied*, 446 U.S. 937 (1980).
12. *Id.* at 803.

that the agency's fears were unfounded. The consequences cited by the agency—widespread discriminatory pricing and selective grandfathering of contracts—could not have occurred and the agency therefore had no good cause for dispensing with statutory notice.

(i) *Discriminatory Pricing*

Prior to announcement of the deemed recovery rule, the agency's regulations prohibited "any form of discrimination among purchasers" which had "the effect of frustrating or impairing the objectives [of the EPAA]." 10 C.F.R. § 210.62(b). Although that section did not prohibit all discriminatory pricing, it certainly reached the kind of egregious conduct which the agency feared. *McWhirter Distributing Co. v. Texaco, Inc.*, 668 F.2d 511 (TECA 1981). Therefore, notice of the deemed recovery rule could not have led to such conduct and the rule was not "necessary" to prevent it.

In any event, interim price discrimination during a ten day comment period[13] would not have jeopardized the public welfare. By the agency's own admission, the deemed recovery rule was promulgated during a period when supplies were on the rebound, market forces were returning, and competition was beginning to result in lower prices. As Chief Judge Devitt noted when invalidating the deemed recovery rule, those conditions do not amount to a crisis involving the "severe adverse economic consequences" necessary to justify waiver of notice and comment. *Lakes Gas Co. v. DOE*, *supra*, 477 F. Supp. at 192. The prospect of market forces influencing prices during a time of adequate supplies is hardly a "calamitous circumstance" which excuses the agency from its rulemaking obligations. *See Nader v. Sawhill*, 514 F.2d 1064, 1069 (TECA 1975). Indeed, the agency itself contemporaneously acknowledged that *not* allowing refiners to respond to changing market conditions was "counter to the interests of independent regional marketers" and therefore "troublesome." 39 Fed. Reg.

13. The FEAA required a comment period of only ten days. *See* 15 U.S.C. § 766(i)(1).

at 32723.[14] Apparently because of its deference to the agency, TECA never mentioned 10 C.F.R. § 210.62(b) and never inquired whether the agency's fears were well-founded.

(ii) *Contract Grandfathering*

The agency's reliance on a fear of "grandfathering" was equally specious. First, it presumes the existence and form of the "grandfather" clause contained in the rule itself. If the agency was truly concerned about such conduct, it would have proposed a rule which did not permit grandfathering. Second, the rule as adopted stated that refiners would not be penalized if unequal passthrough resulted from a contract entered into prior to September 1, 1974. "Grandfathering" after that date, or any other date chosen by the agency, would have been prevented even if the agency had given advance notice of the rule. Thus, there was absolutely no reason not to subject such a rule to public scrutiny. Once again TECA refused to examine these reasons why the agency's fears were unfounded.

3. ***TECA's Reliance On The September 10, 1974 Proposals Warrants this Court's Review***

TECA recognized that there was no record support for the agency's September 5 conclusion that "good cause" existed. TECA nevertheless decided that the agency had found good cause for its action in light of its statements on September 10, 1974. Pet. App. A-33. That conclusion merits review by this Court for two reasons.

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14. Even the agency seemed to recognize that "price discrimination" presented no serious threat to the public, since the rule did not, in fact, prohibit such discrimination. The agency later explained:

> If refiners did wish to institute discriminatory pricing, they could do so under the present regulations which allow unequal price increases provided cost recovery is computed as if the highest price increase had been charged to all customers.

45 Fed. Reg. 72626, 72629 (Nov. 3, 1980).

First, both the APA and the FEAA require the agency to set forth its justification for dispensing with rulemaking requirements in the rules adopted[15]—not in a subsequent proceeding. TECA's unexplained and open departure from those statutes merits examination by this Court.

Second, the agency did not contemporaneously suggest that the policies mentioned in its September 10 proposal presented good cause for adopting the rule without notice. Instead, those policies were cited as reasons for retaining certain aspects of the rule while deleting others. Whatever the merits of the rule, however, the agency was not free to dispense with rulemaking requirements simply because it believed parts of the rule itself were unreasonable. This Court has never permitted agency action to be upheld on the basis of such later rationalizations[16] and TECA's contrary holding merits review.

B. This Court Should Determine Whether Rulemaking Requirements May Be Waived When An Agency Can Fully Accommodate the Public's Right to Participate

Even if the agency had a basis for believing that refiners' actions in response to notice would have seriously impaired the regulatory program, it could have eliminated that problem without offending relevant rulemaking requirements. The agency could have published notice of a proposed rule, solicited comment, and provided in the notice that the rule, if adopted, would be effective as of the original proposal's publication. That simple procedure would have reconciled the agency's desire to prevent pricing abuses or exploitation of the contract exception during the pendency of a rulemaking with the public's statutory right to be heard.

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15. 5 U.S.C. § 553(b)(B) required the agency to incorporate its good cause finding "and a brief statement of the reasons therefor *in the rules issued*" (emphasis added). 15 U.S.C. § 766(i)(1)(B) required the agency to set forth its finding "*in detail in such rule*, regulation or order" (emphasis added).

16. *See, e.g.*, Investment Co. Institute v. Camp, 401 U.S. 617, 628 (1971).

TECA rejected that solution, even though it is squarely in the mainstream of administrative law. "If the admonition to construe the good cause exception of section 553(b)(B) narrowly means anything, it means that we cannot condone its invocation where, as here, such a reconciliation is possible." *New Jersey* v. *EPA*, 626 F.2d 1038, 1047 (D.C. Cir. 1980). A good cause finding is justified only when "execution of the agency's functions would be *unavoidably prevented* by its undertaking public rule-making proceedings." S. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946) (emphasis added).

Neither TECA nor the agency denied that this procedure could have been used to comply with the APA and FEAA without any untoward effects.[17] Nevertheless, TECA rejected it for two reasons. First, it mistakenly believed that requiring the agency to follow the procedure would have amounted to the imposition of a new procedural requirement contrary to *Vermont Yankee Nuclear Power Co.* v. *NRDC*, *supra*. Pet. App. A-32-33n.21. The case law and legislative history, however, demonstrate that where such a reconciliation is possible, there is no good cause. Thus, the issue here is the agency's compliance with "statutory minima"—not additional procedures. *See Mobil Oil Corp.* v. *DOE*, 610 F.2d 796, 804 (TECA 1979), *cert. denied*, 446 U.S. 937 (1980).

Second, TECA was also under the misapprehension that requiring the agency to engage in a reconciliation would have "swallow[ed] the good cause exception [as] interpreted" in its decisions in *Nader* v. *Sawhill*, *supra*, and *DeRieux* v. *Five Smiths, Inc.*, 499 F.2d 1321 (TECA 1974), *cert. denied*, 419 U.S. 896 (1975). Pet. App. A-32-33n.21. But those cases required immediate agency action to deal with existing emergencies—to prevent the withholding of crude oil during a time of critical shortage (*Nader*) or massive price increases during a highly

17. The agency was familiar with this procedure. Slightly more than a month before issuance of the deemed recovery rule, TECA affirmed a rulemaking in which the agency used virtually the same procedure. *See* California v. Simon, 504 F.2d 430, 439 (TECA), *cert. denied*, 419 U.S. 1021 (1974).

inflationary period (*DeRieux*). There was no such emergency here. In addition, the reconciliation procedure was particularly well-suited to this case because it would have prevented the conduct the agency feared.

TECA's decision embraces an interpretation of the good cause exception which permits its invocation even though the public's right to participate in the rulemaking can be readily accommodated. That determination presents an important question of law never passed upon by this Court, departs from settled administrative law and ignores the contrary legislative intent that notice is required unless "unavoidably prevented." Such a far-reaching determination should not escape review by this Court.

II.

TECA's HOLDING THAT THE RULE WAS REPROMULGATED MERITS REVIEW

A. Contrary to Decisions in Other Circuits, the Court of Appeals Held that Post-Promulgation Procedures Can Satisfy Statutory Rulemaking Requirements

TECA held that the rule was validly repromulgated because, in response to the September 10 notice, refiners had an opportunity "to urge its repeal."Pet. App. A-37. That holding departs from the uniform rule that an agency may not satisfy statutory rulemaking requirements by providing a post-promulgation opportunity for comment. *See, e.g., National Tour Brokers Ass'n* v. *United States*, 591 F.2d 896, 901-02 (D.C. Cir. 1978); *Wagner Electric Corp.* v. *Volpe*, 466 F.2d 1013 (3d Cir. 1972). The APA "requires notice *before* rulemaking, not after" and the "right . . . to petition for the amendment or repeal of a rule . . . is neither a substitute for nor an alternative to compliance with the [APA's] notice requirements."*Id.* at 1020 (emphasis in original). As the Fifth Circuit has put it, "after the rule is issued, the petitioner must come hat-in- hand and run the risk that the decisionmaker is likely to resist change." *United States Steel Co.* v. *EPA*, 595 F.2d 207, 214-15, *clarified*, 598 F.2d 915 (5th Cir. 1979). *See South*

Carolina v. *Block*, 558 F. Supp. 1004, 1020-21 (D.S.C. 1983) (collecting cases).

TECA also erred in concluding that, on September 10, 1974, the agency evidenced its "willingness to reevaluate the deemed recovery rule." Pet. App. A-35. The agency only proposed to modify the rule, expressly stating that to the extent the rule protected the independent sector "it must be retained."39 Fed. Reg. 32723. Thus, the agency stated on the record that it would not consider full repeal of the rule, much less reconsider the propriety of issuing it in the first place.

TECA's contrary conclusion was based primarily upon a misunderstanding of the proposed "repeal" in the September 10 notice. *See* Pet. App. A-35-36. It is true that the September 10 proposal did not include the deemed recovery rule. Its absence, however, did not reflect a reconsideration of the rule's merits. Rather, the agency proposed to repeal *all* prospective cost banking. *See* 39 Fed. Reg. 32718, analyzed and summarized at 547 F. Supp. 1254-1258, Pet. App. A-60-67. That proposal, of course, would have made the deemed recovery rule superfluous because *all* costs would be deemed recovered and unavailable for future passthrough.

TECA found the September 10 notice adequate in part because some refiners responded to it by urging repeal of the rule. Pet. App. A-36-37. Refiners' comments, however, are irrelevant, since the proper question is whether the *agency* ever demonstrated that it approached repeal of the rule with an open mind. Far from evidencing good faith reconsideration, agency statements in the new rulemaking confirmed its decision that the basic rule "must be retained."

This Court has never examined whether, and, if so, under what circumstances, an agency may validly "repromulgate" a rule which was not subjected to the "fairness and mature consideration"[18] accomplished by APA rulemaking. The decision below holds that an opportunity to urge a rule's repeal in response to a proposal to amend the rule is sufficient. That view ignores the

18. Chrysler Corp. v. Brown, *supra*, 441 U.S. at 303.

inherent bureaucratic momentum in retaining a rule once adopted and conflicts with the APA's basic concept of pre-promulgation notice as well as the decisions of other lower courts. Since the issue often recurs, *see South Carolina v. Block*, *supra*, 558 F. Supp. at 1020-21, guidance from this Court is warranted.

B. TECA Improperly Deleted The Statement of Basis and Purpose Requirement From APA Rulemaking

The APA mandates that a statement of basis and purpose accompany the publication of new rules. 5 U.S.C. § 553(c). That statement is intended to (a) enable the public to determine the actual bases and objectives of newly promulgated rules and (b) facilitate meaningful judicial review by explaining the legal and factual underpinnings of agency action. *Action On Smoking and Health* v. *CAB*, 699 F.2d 1209, 1215-16, *supp. op.*, 713 F.2d 795 (D.C. Cir. 1983).

TECA's decision effectively rewrites the statute, deleting this requirement. Indeed, TECA concluded that such a statement may be "non-existent" and endorsed a "statement" which does not even mention the rule whose "basis and purpose" it purportedly sets forth. If allowed to stand, this radical misapplication of the statute would eliminate one of the specific requirements and major virtues[19] of APA rulemaking. This Court's review is particularly appropriate here since, as demonstrated below, TECA's begrudging view of the APA led it to plain error.

On December 5 the agency published a notice adopting regulatory provisions wholly unrelated to the deemed recovery rule. The notice went on to state:

> Action on all other revisions to the price regulations proposed in the September 10 notice is deferred until a later date. However, those possible revisions which have not yet

19. *See*, Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 396 (1974).

been acted on continue to be under active consideration by FEA for decision in this proceeding.

39 Fed. Reg. 42368 (December 5, 1974). According to TECA, the agency validly repromulgated the deemed recovery rule when it published that notice. That pronouncement, however, cannot possibly qualify as a statement of basis and purpose for the rule. TECA itself noted that it was "hardly a model statement of the reasons for the agency's decision to retain the deemed recovery rule."Pet. App. A-38. It does not mention the rule, any comments received supporting or opposing the rule or any reasons why the agency would have adopted the rule. In fact, the notice's boilerplate language is almost identical to that found inadequate by the District of Columbia Circuit in *Independent U.S. Tankers Owners Committee v. Lewis*, 690 F.2d 908, 919 (D.C. Cir. 1982).

TECA characterized this deficiency as "technical" since the September 10 preamble "canvassed in some detail the opposing policy considerations involved." Pet. App. A-39. But the agency's September 10 discussion occurred *before* the receipt of any public comment on the rule. A notice of rulemaking and discussion of tentative issues is no substitute for the basis and purpose statement that the APA requires *after* notice and public comment. As other courts have emphasized, a "basis and purpose statement is not intended to be an abstract explanation addressed to imaginary complaints. Rather, its purpose is . . . to respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." *Rodway v. Department of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975). *Accord Action on Smoking and Health v. CAB*, 699 F.2d 1209, 1216-17, *supplemented at* 713 F.2d 795, 799-800 (D.C. Cir. 1983). Here, the agency's violation precluded it from fulfilling its obligation to engage in a dialogue with the public on this far-reaching and onerous rule.

The extreme hazard inherent in TECA's view of the APA is fully revealed in this case. Notwithstanding the absence of a basis

and purpose statement, TECA thought that it could "fairly discern the agency's aims." Pet. App. A-39. In fact, TECA incorrectly read those aims, as the agency itself confirmed soon after the December notice. Nineteen days after it allegedly "repromulgated" the rule, the agency expressly stated that it had not done so. According to its own statement, the agency had "not yet completed its analysis of this [September 10] proposal," relating to the deemed recovery rule. 39 Fed. Reg. 44407 (Dec. 24, 1974). This statement, made weeks *after* TECA held the agency acted, refutes any suggestion that the agency "repromulgated" the equal application rule on December 5.

CONCLUSION

For the reasons set forth above, petitioners urge that a writ of certiorari issue to review the decision of the Temporary Emergency Court of Appeals.

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Respectfully submitted,

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